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U.S. Citizenship
and Immigration
Services

FILE: WAC 02 100 50078 Office: CALIFORNIA SERVICE CENTER Date: **MAR 18 2004**


IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The petitioner is a residential elderly care facility. It seeks to employ the beneficiary permanently in the United States as a board and care manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated that it has the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is February 25, 1997. The beneficiary's salary as stated on the labor certification is \$36,600 per year based on a 40-hour week. The visa petition indicates that the petitioner was established in 1997 and is organized as a sole proprietorship. Because a sole proprietorship is not legally separate from its owner, a petitioner must show that he or she can cover existing business expenses and pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents.

As evidence of its ability to pay the beneficiary's offered wage, the petitioner submitted copies of its Form 1040, U.S. Individual Income Tax Return for the years 1998 through 2001. They reflect that she filed as a single person and claimed no dependents. These income tax returns contained the following information:

Year	Gross Receipts	Business Income (Schedule C)	Adjusted Gross Income
1998	\$70,250	\$40,749	\$37,870
1999	79,400	41,403	38,143
2000	79,577	42,773	39,751
2001	90,400	52,043	49,366

On March 26, 2002, the director requested additional evidence from the petitioner supporting its ability to pay the beneficiary's wage offer of \$36,600 per annum covering the period from the priority date of February 25, 1997 through the present (2001). The director advised the petitioner to submit complete federal tax returns, annual reports, or audited financial statements. The director also requested copies of the petitioner's state quarterly wage reports for the most recent four quarters filed, as well as a summary of the sole proprietor's reasonable monthly living expenses.

In response, the petitioner, through counsel, submitted a copy of a grant deed from the petitioning owner to the "Central California Conference Association of the Seventh-Day Adventists, as trustee of the Esther A. Trinidad 1995 Revocable Trust" reflecting a conveyance of the real property where the petitioning business is located. Counsel also submitted a copy of the petitioner's individual 1997 income tax return. It showed that the sole proprietor declared an adjusted gross income of \$38,168, including a business income of \$41,070. Counsel additionally submitted a letter from the sole proprietor stating that her annual living expenses are \$1,264 per month, annualized to \$15,168. The letter also stated that she owns two acres in Hawaii as well as the real estate where the petitioning business is located.

In denying the petition, the director noted that although the sole proprietor's gross income was slightly more than the beneficiary's wage offer of \$36,600, it was not reasonable to assume that the sole proprietor's adjusted gross income was sufficient to cover both the beneficiary's proffered salary and the sole proprietor's living expenses.

On appeal, counsel asserts that the sole proprietor can borrow against her real property holdings to cover the proffered wage. Counsel submits a copy of a financial statement summarizing the petitioning owner's financial status as of August 2002. It states that the petitioning owner has \$28,000 cash assets, \$500,000 in real property and \$10,000 in liabilities. It is noted that even if the terms of the sole proprietor's revocable trust allow encumbrances to be created against the real property where the petitioning business is located, it would also represent a debt or liability in the consideration of the sole proprietor's financial ability to pay the proffered wage. The AAO further notes that real property does not represent the kind of assets that are easily convertible to cash, and as such, are not generally considered to be readily available to pay a beneficiary's proffered salary. In this case, although the petitioner may have had \$28,000 in cash available to her as of August 2002 when the financial statement was completed, it is unclear if this sum was continuously available to her beginning as of the priority date of February 1997. The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage as of the visa priority date. (Emphasis supplied).

Finally, it is noted that even without including the sole proprietor's annual living expenses of approximately \$15,168, the beneficiary's annual wage offer of \$36,600 represents 96% of the sole proprietor's adjusted gross income in 1997; 97% in 1998; 96% in 1999; 92% in 2000; and 74% in 2001. Although the sole proprietor claimed no dependents during those years, the AAO cannot conclude that it is very likely that the sole proprietor could support herself and cover the beneficiary's proffered wage continuously during the relevant years. In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983), the court

concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or about 30% of the petitioner's gross income.

In view of the foregoing and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage as of the priority date of the visa petition pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.